

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAURICE WILKINS,

Defendant.

No. CR 04-0009

ORDER

I. INTRODUCTION

The matters before the court are Defendant's Renew Pre-Sentence Motion To Vacate Plea with Request For Hearing; And, Motion To Set Aside Sentencing Hearing (docket no. 172) and Defendant's Supplemental Renew Pre-Sentence Motion To Vacate Plea With Request For Hearing, ect. [sic] (docket no. 186).

II. PROCEDURAL BACKGROUND

On January 22, 2004, the grand jury returned a six-count Indictment against Defendant and his co-defendant, Christopher Funchess.¹ Count 5 charged Defendant with distributing and aiding and abetting the distribution of 10.08 grams of crack cocaine on October 31, 2003. Count 6 charged him with conspiring to distribute more than 50 grams of a mixture or substance containing a detectable amount of crack cocaine during 2002 and 2003. On May 12, 2004, Defendant appeared before Chief Magistrate Judge Jarvey and entered his guilty plea to Count 6 of the Indictment. Chief Magistrate Judge Jarvey filed

¹ Counts 1-4 apply only to Christopher Funchess. Count 5 applies only to Maurice Wilkins. Count 6 applies to both defendants.

a Report and Recommendation later that day in which he recommended the court accept Defendant's guilty plea. No objections to the Report and Recommendation were filed. On May 27, 2004, the court adopted Chief Magistrate Judge Jarvey's Report and Recommendation and accepted Defendant's guilty plea to Count 6 of the Indictment. On July 22, 2004, the draft Presentence Investigation Report was prepared and released to the parties. On August 2, 2004, Defendant moved to withdraw his guilty plea based on the Supreme Court's decision in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004) and the Eighth Circuit Court of Appeals' decision in *United States v. Mooney*, ___ F.3d ___, 2004 WL 1636960 (8th Cir. July 23, 2004), *vacated*, 2004 WL 1636960 (8th Cir. Aug. 6, 2004) and because the government allegedly rushed Defendant into entering his plea agreement. The court held a hearing on such motion August 19, 2004 and issued an order August 26, 2004 denying Defendant's motion to withdraw his guilty plea.

On September 5, 2004, Defendant filed a Notice of Appeal of the court's denial of Defendant's motion to withdraw his guilty plea. On September 21, 2004, the Eighth Circuit Court of Appeals dismissed the appeal for lack of jurisdiction.

On January 24, 2005, Defendant filed his pro se Motion for Ineffective Counselor, alleging the following: (1) John Bishop, Defendant's attorney, "has not represented myself (Maurice A. Wilkins) to the best of his ability to assure fairness in the adversary process" and therefore "I did not receive the assistance guaranteed by the 6th Amendment;" (2) Mr. Bishop did not explain the plea agreement to Defendant so he could fully understand it; (3) Mr. Bishop told Defendant he would arrange for Defendant's guilty plea to be withdrawn once he was prepared for trial; (4) Mr. Bishop" filed motions on his own without sending me copies nor having a conference with me (Maurice A. Wilkins) so I could give my own input on the motion," including, e.g., the motion to withdraw guilty plea filed in August 2004; (5) "Paragraphs 23A, B, C, H, J, L, M and N of the plea agreement was pointed

out for me to sign which clearly [is] indispensable evidence. Now I'm facing relevant conduct, which shows John Bishop did not pay close attention to my case before he decided to take actions on representing me (Maurice A. Wilkins);" (6) Mr. Bishop told Defendant on October 7, 2004, "I can not [sic] pay attention to one case in particular when I have many other[s]," which "goes to show he should of [sic] withdrawn from my case if he (John Bishop) was not going to represent me at the best of his ability;" (7) Mr. Bishop "does not pay attention to what he is doing" and "never informed me of my case in a timely manner;" (8) "[t]he only thing in his interest was for me to plea[d guilty] or corporate [sic] with the Marshall's [sic] for information, which was something I wasn't able to do." On January 26, 2005, Mr. Bishop filed a motion to withdraw, which was granted the same date. Also on January 26, 2005, Attorney Frank Santiago was appointed to represent Defendant.

On February 10, 2005, Defendant filed Defendant's Renew Pre-Sentence Motion To Vacate Plea with Request For Hearing; And, Motion To Set Aside Sentencing Hearing. In his motion, Defendant argues he should be allowed to withdraw his guilty plea because he received ineffective assistance of counsel prior to and through the time he entered his guilty plea. Specifically, Defendant contends "fair and just reason[s] for requesting the withdrawal" are: (1) Mr. Bishop "failed to timely and properly investigate defendant's case-in-chief and research a viable defense;" (2) Mr. Bishop "advised the defendant to enter a guilty plea because it was only a trial tactic which would in effect stall the prosecution; thereby giving the defense additional time to prepare for trial" and he "assured the defendant that he will [sic] withdraw the defendant's plea;" (3) Mr. Bishop "repeatedly told defendant that his only choice was to plea[d] guilty because a jury was not going to believe his word over the government's witnesses;" (4) Mr. Bishop met with Defendant three times regarding Defendant's plea agreement and discussed only paragraph

23 (stipulation of facts) telling Defendant “that it was imperative that the defendant sign paragraph 23 and its subsections A, B, C, H, J, L, M, and specifically ‘N’, because AUSA Teresa Baumann would not otherwise accept the plea; and if she did not accept the plea they would lose out on gaining the needed time to prepare for trial,” without reading, reviewing or explaining to Defendant the impact of any of the other paragraphs of the plea agreement; “Defendant signed paragraphs 1 through 8, and 11 through 22, and 24 through 27 without ever knowing what impact, or consequences those paragraphs would have on his life;” and (5) Defendant “made numerous attempts to speak to counsel to inform him that he wanted to withdraw his guilty plea before it was filed with the Court” and although Defendant spoke with Mr. Bishop the day before he entered his guilty plea in court, “he was counsel[ed] to enter a guilty plea with the understanding that his plea entry was a trial delay tactic and that the plea would soon be withdrawn.”

The government resisted Defendant’s Motion on March 4, 2005. The government contends Defendant has failed to meet his burden to show a fair and just reason he should be allowed to withdraw his guilty plea. Specifically, the government avers Defendant’s plea was knowing and voluntary and his asserted reason for withdrawing his guilty plea - Mr. Bishop’s alleged ineffectiveness - is completely unsupported by the record.

On March 9, 2005, Defendant filed his Supplemental Renew Pre-Sentence Motion To Vacate Plea With Request For Hearing, ect. [sic]. In the supplement, Defendant alleges two additional “fair and just reasons” to allow withdrawal of his guilty plea: (1) Mr. Bishop “failed to comply with the defendant’s request to hire a private investigator and defend his innocence’s [sic];” and (2) Mr. Bishop failed to resist the government’s motion to consolidate for trial the cases of Defendant and Christopher Funchess.

On March 11, 2005, the court held a hearing on the two pending motions. Defendant was personally present with his attorney, Frank Santiago. Special Assistant

United States Attorney Teresa Baumann represented the government. The court noted Defendant's pro se Motion for Ineffective Counselor, which in essence was a request for new counsel, had already been addressed by allowing Mr. Bishop to withdraw from representation and appointing Mr. Santiago to represent Defendant. However, the court indicated it would consider Defendant's allegations in such motion as part of his motions to withdraw his guilty plea. The court reserved ruling and indicated this written order would soon follow. Finding the motions to be fully submitted, the court next turns to the merits of the motions.

III. ANALYSIS

Federal Rule of Criminal Procedure 11(d)(2)(B) allows a defendant to withdraw a plea of guilty "after the court accepts the plea, but before it imposes sentence if: . . . the defendant can show a fair and just reason for requesting the withdrawal." Defendant asks the court to allow him to withdraw his plea because of a "fair and just reason," i.e., ineffective assistance of counsel.

While Federal Rule of Criminal Procedure 11(d)(2) permits a defendant to withdraw a guilty plea for any fair and just reason, the Rule "does not create an automatic right to withdraw a plea." *United States v. Gamble*, 327 F.3d 662, 663 (8th Cir. 2003) (quoting *United States v. Kelly*, 18 F.3d 612, 618 (8th Cir. 1994)). Rather, "[a] defendant bears the burden of establishing such a justification." *United States v. Embrey*, 250 F.3d 1181, 1183 (8th Cir. 2001) (citing *United States v. Prior*, 107 F.3d 654, 657 (8th Cir. 1997)). Factors a court must consider in determining whether to set aside a guilty plea include: (1) whether the defendant has demonstrated a fair and just reason; (2) whether the defendant has asserted his innocence; (3) the length of time between the guilty plea and the motion to withdraw; and (4) whether the government would be prejudiced. *Embrey*, 250 F.3d at 1183 (citing *Prior*, 107 F.3d at 657).

A. A Fair And Just Reason

The first factor is whether Defendant has demonstrated a fair and just reason to withdraw his guilty plea. Defendant contends the fair and just reason is his attorney, Mr. Bishop's alleged ineffectiveness. In support of his contention, Defendant alleges the following: (1) Mr. Bishop "failed to timely and properly investigate defendant's case-in-chief and research a viable defense;" (2) Mr. Bishop "advised the defendant to enter a guilty plea because it was only a trial tactic which would in effect stall the prosecution; thereby giving the defense additional time to prepare for trial" and he "assured the defendant that he will [sic] withdraw the defendant's plea;" (3) Mr. Bishop "repeatedly told defendant that his only choice was to plea[d] guilty because a jury was not going to believe his word over the government's witnesses;" (4) Mr. Bishop met with Defendant three times regarding Defendant's plea agreement and discussed only paragraph 23 (stipulation of facts) telling Defendant "that it was imperative that the defendant sign paragraph 23 and its subsections A, B, C, H, J, L, M, and specifically 'N', because AUSA Teresa Baumann would not otherwise accept the plea; and if she did not accept the plea they would lose out on gaining the needed time to prepare for trial," without reading, reviewing or explaining to Defendant the impact of any of the other paragraphs of the plea agreement; "Defendant signed paragraphs 1 through 8, and 11 through 22, and 24 through 27 without ever knowing what impact, or consequences those paragraphs would have on his life;" (5) Defendant "made numerous attempts to speak to counsel to inform him that he wanted to withdraw his guilty plea before it was filed with the Court" and although Defendant spoke with Mr. Bishop the day before he entered his guilty plea in court, "he was counsel[ed] to enter a guilty plea with the understanding that his plea entry was a trial delay tactic and that the plea would soon be withdrawn;" (6) Mr. Bishop "failed to comply with the defendant's request to hire a private investigator and defend his innocence's

[sic];” (7) Mr. Bishop failed to resist the government’s motion to consolidate for trial the cases of Defendant and Christopher Funchess; (8) Mr. Bishop “has not represented myself (Maurice A. Wilkins) to the best of his ability to assure fairness in the adversary process” and therefore “I did not receive the assistance guaranteed by the 6th Amendment;” (9) Mr. Bishop did not explain the plea agreement to Defendant so he could fully understand it; (10) Mr. Bishop told Defendant he would arrange for Defendant’s guilty plea to be withdrawn once he was prepared for trial; (11) Mr. Bishop” filed motions on his own without sending me copies nor having a conference with me (Maurice A. Wilkins) so I could give my own input on the motion,” including, e.g., the motion to withdraw guilty plea filed in August 2004; (12) “Paragraphs 23A, B, C, H, J, L, M and N of the plea agreement was pointed out for me to sign which clearly [is] indispensable evidence. Now I’m facing relevant conduct, which shows John Bishop did not pay close attention to my case before he decided to take actions on representing me (Maurice A. Wilkins);” (13) Mr. Bishop told Defendant on October 7, 2004, “I can not [sic] pay attention to one case in particular when I have many other[s],” which “goes to show he should of [sic] withdrawn from my case if he (John Bishop) was not going to represent me at the best of his ability;” (14) Mr. Bishop “does not pay attention to what he is doing” and “never informed me of my case in a timely manner;” and (15) “[t]he only thing in his interest was for me to plea[d guilty] or corperate [sic] with the Marshall’s [sic] for information, which was something I wasn’t able to do.” In support of Defendant’s allegations, Defendant testified at the March 11, 2005 hearing and presented his own affidavit and the affidavit of his girlfriend, Talika Baker; Defendant also offered a portion of Christopher Funchess’s trial transcript from June 1, 2004, which was taken after Defendant’s plea on May 12, 2004.

The government responds that Defendant has failed to demonstrate a fair and just reason to allow him to withdraw his guilty plea and his allegation that Mr. Bishop was

ineffective is completely unsupported by the record. The government offered Mr. Bishop's testimony, the discovery log and the records of the Linn County jail to demonstrate Mr. Bishop actively investigated the case and met with Defendant numerous times prior to his guilty plea on May 12, 2004.

Mr. Bishop was appointed to represent Defendant on April 6, 2004. The jury trial was set for June 1, 2004. Pursuant to the court's Trial Management Order filed April 5, 2004, Defendant was on notice that, absent exceptional circumstances, he would not receive the additional one-level decrease for acceptance of responsibility provided for under U.S.S.G. § 3E1.1(b)(2) unless he signed a plea agreement or, if pleading guilty without a plea agreement, filed his notice of intent to plead guilty at least 15 business days prior to the trial date and entered his guilty plea at least two weeks before trial. The parties had a plea agreement in this case. Therefore, in order to maximize the benefit of pleading guilty, Defendant had to sign his plea agreement on or before May 10, 2004 and had to enter his guilty plea on or before May 18, 2004. The plea agreement was signed by all parties as of May 10, 2004.² Defendant entered his guilty plea on May 12, 2004.

At the March 11, 2005 hearing, Mr. Bishop testified he has been an attorney for nearly 13 years and has practiced criminal defense work in Federal court since 1996. Mr. Bishop stated 2004 was his busiest year representing defendants in Federal court, representing approximately 10-12 defendants during the year and having three trials. Mr.

² Defendant did not date his signature. However, Mr. Bishop signed the plea agreement on May 7, 2004 and Ms. Baumann signed the plea agreement on May 10, 2004. The court is aware of the practice of many (if not all) defense attorneys to not sign a plea agreement until after the defendant has signed it and the practice of the United States Attorney's Office not to sign a plea agreement until after a defendant has signed it. Therefore, the court is satisfied Defendant signed the plea agreement by May 10, 2004, and he very likely signed it on May 7, 2004 when Mr. Bishop signed it.

Bishop received a proposed plea agreement from the United States shortly after he first met Defendant. Because Mr. Bishop was concerned that deadlines in Federal court, especially for entering a plea, seem to pass quickly, Mr. Bishop took a copy of the plea agreement to the jail a day or two after he received the plea agreement when he visited Defendant and he discussed the plea agreement with Defendant. Mr. Bishop also left a copy with Defendant for him to review at his convenience. Mr. Bishop testified he spent a significant amount of time discussing with Defendant the difference between a guilty plea and going to trial. Mr. Bishop also discussed with Defendant the proposed plea agreement, including the detailed factual stipulation contained therein. Mr. Bishop also reviewed the government's discovery file on April 7, 2004 and April 15, 2004 and shared the information (in the form of audio tapes and paper documents) with Defendant prior to his guilty plea.

Mr. Bishop testified Defendant never told him he was innocent of the charges. In fact, when Defendant disputed the facts contained in the proposed plea agreement, Mr. Bishop encouraged and advised him to go to trial. Defendant told Mr. Bishop he could see the government could prove his guilt by under the aiding and abetting alternative and therefore he did not want to go to trial. Mr. Bishop indicated Defendant's main complaint with the proposed plea agreement was the drug quantity charged in the conspiracy count. Mr. Bishop spoke with Ms. Baumann to see if the government was willing to argue the quantity at sentencing, but Ms. Baumann, after conferring with a superior in her office, told Mr. Bishop that arguing quantity at sentencing would require almost as much work from the government as trial and so the government would rather try Funchess and Defendant together once than go through the motions twice. Mr. Bishop informed Defendant of the government's position and Defendant chose not to go to trial.

Mr. Bishop also testified he discussed with Defendant possible defenses to both

charges. For example, Mr. Bishop indicated there was a possible defense to the controlled buy that he didn't have the requisite knowledge because occasionally Defendant would tell Mr. Bishop "I didn't know what was going on. I was just driving. I hung out with these guys. That's all." Mr. Bishop advised Defendant if that was true, Defendant was innocent and should go to trial. Mr. Bishop stated that at those times, Defendant would back off of his claims of innocence. Regarding the conspiracy charge, Mr. Bishop and Defendant discussed Charles Pennington's grand jury testimony and the resulting government witness credibility issues. Mr. Bishop advised Defendant about the strength of possible defenses versus the strength of the government's evidence. Mr. Bishop explained to Defendant what "aiding and abetting" means by telling him he could be charged and/or sentenced and treated as a principal – he did not have to physically hand the crack cocaine to the undercover officer – if he knew what was going on and took some sort of active role in the offense.

Mr. Bishop stated Defendant did not provide him with a written list of possible defense witnesses, but they discussed the individuals who could testify on Defendant's behalf. Mr. Bishop and Defendant specifically discussed calling Charles Roseborough because in his grand jury testimony he denied Defendant was involved in the charged conspiracy. Mr. Bishop spoke with Defendant about having his girlfriend, Talika Baker, testify because she would support Defendant's contention he did not live at the apartment alleged, but Defendant said he was not interested in having her testify.

Mr. Bishop testified he spent more time with Defendant than he typically spends with an individual prior to entering a guilty plea. According to the Linn County Correctional Center records, Mr. Bishop met with Defendant eight times during the five

weeks Mr. Bishop represented him prior to his guilty plea.³ Mr. Bishop indicated Defendant frequently called him and asked him to visit Defendant, and Mr. Bishop did so. Mr. Bishop spent a lengthy amount of time with Defendant going through everything, reviewing all of the discovery, and discussing the case. Mr. Bishop testified he went through each and every line of the plea agreement with Defendant before Defendant signed it. As far as Mr. Bishop knew, Defendant understood the plea agreement. Defendant never told Mr. Bishop he did not understand the plea agreement. Mr. Bishop stated he probably told Defendant he had a deadline by which he had to file his intent to plead guilty, which Mr. Bishop is sure put pressure on Defendant, but it was not pressure from Mr. Bishop. Rather, Mr. Bishop testified it was, in his opinion, the court system's pressure and is typical of any federal client.

Mr. Bishop testified he never told Defendant to sign the plea agreement as a trial delay tactic and never told Defendant he was unprepared for Defendant's trial. Mr. Bishop stated he would have been ready for trial if Defendant had chosen not to sign the plea agreement and to go to trial. Mr. Bishop testified if Defendant had asked him to go to trial, he would have gladly taken Defendant to trial.⁴ Furthermore, Mr. Bishop stated he

³ The Linn County Correctional Center log indicates Mr. Bishop visited Defendant on April 8, April 12, April 13, April 19, May 6, twice on May 7, and May 11, 2004. The records indicate Mr. Bishop visited Defendant an additional 20 times after May 11, 2004. Mr. Bishop last visited Defendant at the Linn County Correctional Center on January 13, 2005.

⁴ Defendant inquired as to whether Mr. Bishop was too busy preparing for his first federal jury trial of the year at the time he represented Defendant. According to court records, Mr. Bishop was appointed to represent Defendant on April 6 and his trial was set for June 1, 2004. Mr. Bishop was appointed to represent another client on April 30, 2004 and he went to trial July 6, 2004. Mr. Bishop testified he would have had plenty of time
(continued...)

never told Defendant he could withdraw his guilty plea after he entered it. Mr. Bishop did not think Defendant harbored any regrets about signing the plea agreement because Mr. Bishop had no doubt Defendant had put a lot of thought into it. Mr. Bishop indicated it was not a decision Defendant entered into lightly.

Finally, Mr. Bishop testified he did not resist the government's motion to consolidate the trials of Defendant and Christopher Funchess because he believed there were no grounds for a resistance. Mr. Bishop did not believe needing more time to prepare for trial would be a good reason to resist the government's motion and stated if he needed a continuance, he would have moved for one rather than resisting the government's motion to consolidate as a ruse to continue the case.

The transcript of Defendant's guilty plea hearing includes, in relevant part, the following exchange between Chief Magistrate Judge Jarvey and Defendant:

THE COURT: Have you received a copy of the Indictment in this case that was returned on January 22nd, 2004?

DEFENDANT: Yes, sir.

THE COURT: Are you fully familiar with the charges against you in Counts 5 and 6 of the Indictment?

DEFENDANT: Yes.

THE COURT: Have you discussed those charges and the evidence in this case with your attorney, Mr. Bishop?

⁴(...continued)

to prepare for Defendant's trial if Defendant had indicated he wished to proceed to trial rather than plead guilty.

DEFENDANT: Yes.

THE COURT: Have you talked with him about possible defenses to these charges?

(Mr. Wilkins conferred with Mr. Bishop off the record.)

DEFENDANT: Yes.

THE COURT: And are you fully satisfied with the counsel, representation, and advice given to you in this matter by Mr. Bishop?

DEFENDANT: Yes.

Transc. of Plea Hearing, 5-6 (May 12, 2004). After Ms. Baumann summarized the details of the plea agreement, Chief Magistrate Judge Jarvey inquired into Defendant's knowing and voluntary entry into the plea agreement.

THE COURT: Take a look at the last page of the Plea Agreement if you would. Is that your signature?

DEFENDANT: Yes, sir.

THE COURT: Before you signed the Plea Agreement had you read all of it?

DEFENDANT: Yes, sir.

THE COURT: Had you discussed all of it with your lawyer?

DEFENDANT: Yes, sir.

THE COURT: Do you understand it?

DEFENDANT: Yes, Sir.

THE COURT: Do you have any questions either for me or for Mr. Bishop about the Plea Agreement before we go further?

DEFENDANT: No, sir.

THE COURT: I see the initials “MW” in front of each of these paragraphs; did you put those there?

DEFENDANT: Yes, sir.

THE COURT: Did you do that to indicate that you both understood and agreed with each of those paragraphs?

DEFENDANT: Yes, sir.

THE COURT: And do you agree to be bound by the promises that you made in the Plea Agreement?

DEFENDANT: Yes, sir.

THE COURT: Other than the promises made to you in the Plea Agreement, has anyone made any other promises or given you any assurance of any kind in an effort to get you to plead “guilty”?

DEFENDANT: No, sir.

THE COURT: Did anybody try to force, threaten, pressure, or coerce you into pleading “guilty”?

DEFENDANT: No, sir.

Id. at 7-8. Because the plea agreement provided Count 5 would be dismissed in exchange for Defendant's guilty plea to Count 6, Chief Magistrate Judge Jarvey went through the elements of only the offense charged in Count 6 and explained to Defendant what the government would be required to prove if Defendant chose to go to trial. Chief Magistrate Judge Jarvey also explained the sentencing process and that only the undersigned judge would decide what sentence to impose and it could be different than the sentence anticipated by Mr. Bishop. Chief Magistrate Judge Jarvey warned Defendant, "you can't withdraw this 'guilty' plea, you can't take it back, simply because you disagree with the Presentence Report or because you disagree with the sentence that you receive; do you understand that?" *Id.* at 17. Defendant answered that he understood. Chief Magistrate Judge Jarvey advised Defendant of the rights he was waiving by pleading guilty and instructed Defendant, "[t]here will be no more hearings in this court except those necessary to determine your punishment; do you understand that?" *Id.* at 19. When Chief Magistrate Judge Jarvey asked Defendant if his decision to plead guilty was voluntary and if Defendant believed it was in his best interest to plead guilty, Defendant answered affirmatively. Finally, Chief Magistrate Judge Jarvey asked, "Do you understand that if you plead 'guilty,' it is extremely unlikely that you will ever be allowed to withdraw that plea?" to which Defendant answered "Yes, sir." *Id.* at 21. When Chief Magistrate Judge Jarvey asked Defendant how he wished to plead, guilty or not guilty, to the charge contained in Count 6, Defendant stated, "Guilty." *Id.* The subsequent dialogue proceeded as follows:

THE COURT: You hesitated there. If you have any hesitation, tell me now, because this is the last time that anybody is ever going to listen to you about whether you are guilty

or not guilty of this charge.

DEFENDANT: It's because the 2002.

THE COURT: Okay. And you say that you joined this conspiracy later than the Government thinks; is that right?

DEFENDANT: Yes, sir.

THE COURT: All right. Is there anything else that you want to say about that?

DEFENDANT: No, sir.

Id.

The court finds Mr. Bishop regularly and frequently met with Defendant regarding his case. He investigated the case by reviewing the government's discovery file and discussing the case with Defendant regarding possible witnesses and defenses.⁵ Mr. Bishop fully explained the plea agreement to Defendant and Defendant voluntarily entered into the plea agreement. Mr. Bishop was willing to go to trial and encouraged Defendant to do so when Defendant contested the factual basis in the plea agreement. The court finds Mr. Bishop, a seasoned veteran of the Federal court, did not tell Defendant to plead guilty as a delay tactic and he could withdraw his guilty plea when Mr. Bishop was ready to proceed to trial. The court finds all the evidence demonstrates Defendant voluntarily pled guilty after a thorough review of the government's evidence against him and his possible defenses at trial. Defendant voiced his only concern with his guilty plea – that the

⁵ Defendant contends Mr. Bishop was ineffective for failing to hire an investigator when he asked Mr. Bishop to do so. An attorney is not required to hire an investigator simply because a defendant requests one. Mr. Bishop indicated to Defendant he could investigate the case himself and the court finds Mr. Bishop did a thorough job.

conspiracy charged acts in 2002 and 2003 and he joined the conspiracy in 2003 – at the plea hearing. Defendant also stated at the plea hearing that he had fully reviewed the plea agreement, the evidence, and any possible defenses thoroughly with Mr. Bishop and he was satisfied with his representation. Defendant’s self-serving statements nine to ten months after he pled guilty and seven to eight months after the PSIR was prepared demonstrate Defendant is displeased with the potential sentence he faces for the crimes he admitted in the plea agreement he committed. Therefore, the court finds Defendant’s allegation Mr. Bishop was ineffective does not present a fair and just reason to withdraw his plea.

B. Defendant’s Assertion Of Innocence

The second factor is whether Defendant asserted his innocence. Until the March 11, 2005 hearing regarding the motions to withdraw his guilty plea, Defendant has never asserted his actual innocence of the crimes charged. At the guilty plea hearing, Magistrate Judge Jarvey discussed the factual stipulation with Defendant:

THE COURT: Now, I see that some of these paragraphs that the Government typed up in the proposed Plea Agreement, paragraph D, E, F, G, I, and K you crossed out and refused to sign. Is that because you didn’t want to agree that those things were true after you read them?

DEFENDANT: Yes.

THE COURT: Okay. I can’t hear you.

DEFENDANT: Yes.

THE COURT: Thanks. And that’s fine. Do you remember the Stipulation of Facts?

DEFENDANT: Yes.

THE COURT: By putting your initials in front of those paragraphs 23A, B, C, H, J, L, M, and N, did you intend to indicate that everything in those paragraphs was true?

DEFENDANT: Excuse me?

THE COURT: By putting your initials in front of those paragraphs in paragraph 23 of the Plea Agreement, did you intend to indicate that all of the things in the paragraphs that you initialed were true?

DEFENDANT: Yes.

Id. at 11-12. In paragraphs 23A, B, C, H, J, L, M, and N of the Plea Agreement, Defendant admitted Cedar Rapids police officers found 66.19 grams of crack cocaine, a scale, baggies, two handguns, ammunition and cash at his residence, 416 17th Street Southeast, Apartment 1, Cedar Rapids, Iowa, during a search conducted on October 7, 2003. He further admitted he arranged to sell \$400 worth of crack cocaine to a confidential informant (“CI”) on October 31, 2003. Defendant, Maurice Pennington, Charles Roseborough, and Christopher Funchess arrived at the predetermined location to sell the crack cocaine to the CI. During the transaction, Roseborough sold 10.08 grams of crack cocaine to undercover Drug Enforcement Administration Task Force Officer Joshua Lupkes in exchange for \$400. On November 13, 2003, during a search executed at 1638 Park Towne Lane Northeast, Apartment 2, Cedar Rapids, Iowa, officers seized 1.91 grams of crack cocaine, a High Standard .22 caliber revolver, a Sears Auto Center receipt naming Defendant as the customer and other documents belonging to Defendant, Pennington, Roseborough, Funchess, and Chelsea Peyton. Defendant further admitted

between about June 2003 and November 2003, Pennington fronted or sold Defendant varying quantities of crack cocaine on various occasions. Defendant used the same telephone as Funchess, Pennington, Roseborough and Michael Lewis to take customers' orders for crack cocaine. If Defendant did not have crack cocaine available for sale, he took his customers to Pennington to obtain the crack cocaine. Defendant admitted between about June 2003 and November 2003, Defendant agreed with Pennington, Roseborough, Lewis and Funchess to distribute 50 grams or more of crack cocaine in the Cedar Rapids, Iowa area.

C. Time Between Guilty Plea And Motion To Withdraw

The third factor is the length of time between the guilty plea and the filing of the motions to withdraw. The guilty plea hearing was held May 12, 2004 and the plea was accepted by the court without objection on May 27, 2004. The draft Presentence Investigation Report was prepared on July 22, 2004. Defendant filed the pending motions to withdraw his guilty plea February 10, 2005 and March 9, 2005, approximately nine and ten months after Defendant entered his guilty plea.

D. Prejudice To The Government

The fourth factor is whether the government would be prejudiced in allowing Defendant to withdraw his guilty plea. The court knows of no particular prejudice to the government from allowing Defendant to withdraw his plea other than the prejudice to the government from requiring it to now prepare for trial when Defendant had previously waived his jury trial rights and indicated the government could expend its resources elsewhere.

After considering all of the factors set forth above, the court finds Defendant has not provided a fair and just reason, as required by Federal Rule of Civil Procedure 11(d)(2)(B), that he should be allowed to withdraw his guilty plea.


IV. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED:**

- (1) The court **DENIES** Defendant's Renew Pre-Sentence Motion To Vacate Plea with Request For Hearing; And, Motion To Set Aside Sentencing Hearing (docket no. 172).
- (2) The court **DENIES** Defendant's Supplemental Renew Pre-Sentence Motion To Vacate Plea With Request For Hearing, ect. [sic] (docket no. 186).

SO ORDERED.

DATED this 17th day of March, 2005.



LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA